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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/810,484

03/26/2004

Palpu Pushpangadan

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8114

23552 7590 02/26/2007

MERCHANT & GOULD PC

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MINNEAPOLIS, MN 55402-0903

EXAMINER

LEITH, PATRICIA A

ART UNIT

PAPER NUMBER

1655

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

02/26/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/810,484

Applicant(s)

PUSHPANGADAN ET AL.

Examiner

Patricia Leith

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1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 3-5, 7-9 and 84 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-5, 7-9 and 84 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 2/2/07 has been entered.

Claims 1, 3-5, 7-9 and 84 are pending in the application and were examined on their merits.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a previous Office Action.

Claim Rejections - 35 USC § 103

Claims 1, 3-5, 7-9 and 84 are newly rejected under 35 U.S.C. 103(a) as being unpatentable over Pletcher, B. (1998) in view of Fetrow et al. (2000) in view of Flick (1995).

The teachings of Pletcher were keenly discussed in previous Office Actions. Pletcher did not specifically teach the amounts of oils as Instantly claimed, nor did they teach the particular carriers as Instantly claimed.

Fetrow et al. (2000) taught that herbal oils were often diluted in fatty oils or water to prevent irritation of the skin (see p. 13). Fetrow et al. further taught that "commercial varieties of ointments, salves, and rubs usually are more appealing than homemade concoctions" and teaches how to make an ointment by preparing the active ingredients with lanolin or beeswax (p. 13).

Flick (2000) taught a massage cream comprising a W/O emulsion comprising mineral oil, avocado oil, water and sodium chloride (*inter alia*).

It was clear from Pletcher that a composition made from simmering gotu kola in sesame oil was known as an aromatherapy-type massage oil. It is deemed, especially in light of the fact that the mixture was simmered, that the simmering would have extracted the gotu kola oils from the gotu kola leaves; thereby resulting in a composition comprising kotu kola leaf oil and sesame oil (again, sesame oil is known to come from

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the sesame seed). Although the reference did not specifically teach the amounts of oils as Instantly claimed, it is deemed that one of ordinary skill in the art would have been motivated to vary the amounts of oil in the composition in order to make other forms of the composition such as creams and lotions and ointments for example. It was clear from Fetrow et al. that rubbing oils are routinely mixed with carriers in order to dilute rubbing oils and specifically acknowledged that the addition of such carriers was beneficial in that 'commercial varieties ...usually are more appealing'. Therefore, one of ordinary skill in the art would have had a reasonable expectation that formulating the well known sesame seed oil/gotu kola oil massage preparation into carriers would have been more appealing to the consumer.

It was clear from the prior art that carriers such as sodium chloride were well known to be present in massage creams as taught by Flick. One of ordinary skill in the art would have been motivated to replace the avocado oil and mineral oil as disclosed by Flick (which contains sodium chloride) with sesame oil and gotu kola oil in order to provide a known massage oil composition with better consumer appeal.

Applicant's arguments were fully considered and deemed persuasive in-part; hence the new rejection which combines Fetrow et al. and Flick with Pletcher.

Applicant additionally argues that "Applicant discloses in the specification that alcohol and carbohydrates, as well as other optional ingredients make up the bulk of the

composition of the invention" (p. 4, Remarks). However, this argument is moot in light of the new rejection set forth *supra*.

Applicant argues that Pletcher did not teach the amounts of constituents as Instantly claimed. The Examiner agrees that Pletcher did not specifically disclose the claimed amounts, and therefore provides Fetrow et al. and Flick in support of the Pletcher reference. Applicant argues that "It is likely that diluting the formulation to a total amount of extract...or less would render the formulations of Plecher useless for aromatherapeutic purposes" (pp. 4-5, Remarks). However, this statement is unsubstantiated as there is no evidence of record that this would in fact be the case. Further, as disclosed in the new rejection made above, diluting rubbing oils was well known to one of ordinary skill in the art at the time the invention was made in order to provide topical compositions such as creams and lotions which were more appealing to consumers.

Applicant argues that "Applicant's invention is not whole leaf matter in oil. Such a formulation would not be desirable for ingestion as an elixir or syrup, or suitable for enclosure in a capsule" (p. 5). However, it is clear from Pletcher that the leaves are removed from the sesame oil prior to administration to the skin. Therefore, this argument is rendered moot.

Applicant argues that "There is no teaching or suggestion in Pletcher to extract plant matter in alcohol, as does Applicant, to result in an extract" (p. 5, Remarks). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., extract plant matter in alcohol) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant also argues that "...there is no teaching or suggestion in Pletcher to ingest the mixture". Again, Applicant is arguing limitations which are not found in the claims. It is clear that the prior art suggested the claimed invention, even if were for a different purpose than Applicant's. It is deemed that the composition disclosed by Pletcher was in the form of an 'elixir, syrup or suspension" as recited in claim 7, and that the addition of a salt such as sodium chloride into a known massage oil composition to provide a cream form of that massage oil would have been well within the purview of the ordinary artisan at the time the invention was made.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of

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ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

No Claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia Leith whose telephone number is (571) 272-0968. The examiner can normally be reached on Monday - Friday 8:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Patricia Leith

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Primary Examiner
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February 16, 2007

A handwritten signature in black ink, appearing to read "Patricia J. Felt". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.